

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE**

LOUISIANA-PACIFIC CORPORATION,)	
)	
Plaintiff/Counter-Defendant,)	
)	
v.)	CIVIL ACTION NO. 3:18-cv-00447
)	
JAMES HARDIE BUILDING PRODUCTS, INC.,)	DISTRICT JUDGE JON P. McCALLA
)	
Defendant/Counter-Plaintiff/Third- Party Plaintiff,)	JURY DEMAND
)	
)	
v.)	
)	
THE KRUSE BROTHERS, INC.,)	
)	
Third-Party Defendant.)	

**DECLARATION OF DELWYN KUBELDIS, CIH, CSP, ARM
IN SUPPORT OF JAMES HARDIE BUILDING PRODUCTS, INC.'S MOTION FOR
PRELIMINARY INJUNCTION AGAINST LOUISIANA-PACIFIC CORPORATION
AND THE KRUSE BROTHERS, INC.**

I, Delwyn Kubeldis, declare as follows:

1. My name is Delwyn Kubeldis. I am the VP-Consultation for Amerisafe Consulting and Safety Services (ACSS). I have held this position since February 2015.

2. I am over the age of 21 and am fully competent to testify regarding the facts set forth in this Declaration. I am familiar with the facts and circumstances of the above-captioned proceeding, and make these statements based upon personal knowledge as well as my education, background, experience, and expertise.

A. BACKGROUND AND QUALIFICATIONS

3. I have a M.S., Environmental Science (Industrial Hygiene focus) from Drexel University, and a B.S., Safety Sciences from Indiana University of Pennsylvania.

4. I have over 35 years of occupational safety and health (S&H) experience. I am a Certified Industrial Hygienist (CIH), a Certified Safety Professional (CSP), and have earned the distinction Associate in Risk Management (ARM). A true and correct copy of my curriculum vitae is attached hereto as **Exhibit A**.

5. Over my 35 years as a practicing health and safety professional, I have provided technical industrial hygiene services to a range of clients, including:

- Served as Project Manager and Team Leader as part of a team of industrial hygienists conducting health and safety assessments of operations for the U.S. Army Environmental Hygiene Agency (AEHA) - now known as USACHPPM. The 5-year, \$2.0 M project involved observing operations performed by military, civilian, and Local National personnel to evaluate tasks performed, identify job hazards, and recommend task-specific controls.
- Served as Project Manager and Lead Trainer in the execution of a comprehensive, \$3.5 M project to support the Air Force Industrial Hygiene Program. Project involved developing meaningful metrics of program performance to include in the assessment process, and then conducting assessments of industrial hygiene exposures at USAF installations. As Team Leader wrote sections of the Industrial Hygiene Management Plan for the ASAF that was then customized for each of ten installations.
- Provided industrial hygiene management services for construction, manufacturing, utility and other clients; including quantitative and qualitative assessments and strategic/tactical guidance.

6. In my role as VP-Consultation for ACSS, I manage ACSS's Consultation Group, and provide consultation on OSHA standards, S&H consulting, training, and legal support services. I provide these services to construction industry personnel, plant managers, utility operators, and government officials, among others, in the United States, the United Kingdom, Germany, Italy, and Belgium.

7. I have specific consulting experience as a subject matter expert on the U.S. Occupational Safety and Health Administration's (OSHA) "Occupational Exposure to Respirable Crystalline Silica" standard ("OSHA Silica Standard"); developing and implementing S&H programs; conducting OSHA compliance assessments; and other related activities.

8. My area of expertise includes OSHA standards interpretation, industrial hygiene, occupational safety, risk management, and construction safety.

9. I have been a Certified OSHA Outreach Trainer for 10-Hour and 30-Hour Courses, including Health Hazards in Construction, starting in 2000 and through as recently as March 2018.

10. Most recently, I have trained hundreds of construction industry personnel on the OSHA Silica Standard to include Competent Person training and Silica Awareness training.

11. I am a frequent presenter on OSHA's Silica Standard, having presented to the Associated General Contractors of America (AGC), the AGC of Maine, the AGC of DC, the Constructors Association of Western Pennsylvania, the Mid-Atlantic Safety and Health Alliance, and other organizations.

12. Since 2016, Amerisafe has provided consulting services to James Hardie to help construction industry personnel navigate the OSHA Silica Standard. In this role, Amerisafe has provided to installers upon request OSHA Silica Standard training materials, template Exposure Control Plans (ECPs), and quizzes covering aspects of the new OSHA Silica Standard to test the trainees' knowledge of OSHA's compliance requirements. Amerisafe has also conducting industrial hygiene monitoring and provided safety professionals on construction sites to assist contractors and installers in understanding and complying with the OSHA Silica Standard.

13. A list of my publications for the last 10 years is attached hereto as **Exhibit B**.

14. I am being compensated at an hourly rate of \$175.00/hour to serve as an expert witness in this case.

15. I have not testified as an expert witness at either a deposition or trial during the previous four years.

B. MATERIALS REVIEWED

16. In making this Declaration, I have considered and relied upon my education, background, experience, and expertise. I also reviewed the text of the OSHA Silica Standard.

17. I have also received the following documents:

- a. National Institute for Occupational Safety and Health (“NIOSH”) EPHB Report No. 358-12a, *Partnering to Control Dust from Fiber-Cement Siding*;
- b. Louisiana-Pacific Corporation’s (“LP”) Complaint (ECF No. 1);
- c. James Hardie Building Products, Inc.’s Answer, Counterclaims, and Third Party Complaint (ECF No. 28);
- d. The email communication from Mark Rose dated September 22, 2017, regarding the OSHA Silica Standard;
- e. LP’s Answer to the Counterclaim (ECF No. 51).
- f. Kruse Brothers Inc. Answer to the Counterclaim and Third Party Complaint (ECF No. 56).

18. I understand that discovery is ongoing in this case. I reserve the right to supplement or amend this declaration should additional information become available to me.

C. SUMMARY OF OPINIONS

19. To a reasonable degree of professional certainty, the OSHA Silica Standard does not prohibit end users, including those entities and individuals that must comply with OSHA regulations, from using a standard circular saw to cut fiber cement board.

20. To a reasonable degree of professional certainty, entities and individuals that must comply with OSHA regulations are not mandated or required to place caution tape around a job site or “warn” neighbors that they are working with fiber cement products.

21. To a reasonable degree of professional certainty, entities and individuals that must comply with OSHA regulations are not required by OSHA to wear a respirator when working with fiber cement products.

D. OSHA SILICA STANDARD

22. OSHA issued the OSHA Silica Standard titled “Respirable Crystalline Silica” for construction on March 25, 2016. Enforcement of the OSHA Silica Standard by Federal OSHA went into effect on September 23, 2017.

23. The term “Action Level” (AL) as used in the OSHA Silica Standard means a concentration of airborne respirable crystalline silica of $25 \mu\text{g}/\text{m}^3$ as 8-hour Time-Weighted Average (TWA).

24. The term “Permissible Exposure Limit” (PEL) as used in the OSHA Silica Standard means a concentration of airborne respirable crystalline silica of $50 \mu\text{g}/\text{m}^3$, as 8-hour TWA.

25. When applicable, the OSHA Silica Standard requires employers to limit worker exposures to respirable crystalline silica and take other steps to protect workers.

26. The OSHA Silica Standard does not apply if worker exposure is less than the Action Level (AL) for all tasks performed onsite under foreseeable conditions.

27. Tasks involving fiber cement board with exposures below the Action Level include: scoring, snapping, or shearing fiber cement board; working at least 25 feet from a cutting operation; and storing, moving, or handling fiber cement board.

28. The PEL under the OSHA Silica Standard for respirable crystalline silica is 50 µg/cubic meter. The OSHA Silica Standard does not require or prohibit any particular methods of compliance to limit exposures below the PEL, but does mandate the order of control methods.

29. Employers can either use the control methods laid out in Table 1 in the Silica Standard for a limited number of Tasks, or they can measure workers' exposure to silica and independently decide which dust controls work best to limit exposures in their workplace to the PEL.

30. Table 1 of the OSHA Silica Standard matches 18 common construction tasks with effective dust control methods. Employers who follow Table 1 fully and properly are not required to conduct monitoring for workers' exposure to silica from those tasks and are presumed to have worker exposures below the PEL.

31. The dust control methods set forth in Table 1 of the OSHA Silica Standard provide a "safe harbor" for employers, but are not required for an employer to be in compliance with the OSHA Silica Standard. Indeed, Table 1 only features 18 of an estimated over 200 construction tasks, and therefore, is not meant to be an exhaustive or exclusive list of the methods of compliance.

32. The use of a standard circular saw to cut fiber cement siding products is not prohibited under the OSHA Silica Standard. In fact, one of the exemplar tasks on Table 1 of the

OSHA Silica Standard is using a handheld power saw (e.g., a circular saw) for cutting fiber cement board (with blade diameter of 8 inches or less).

33. For this task, Table 1 prescribes the following engineering and work practice control methods:

Equipment / Task	Engineering and Work Practice Control Methods	Required Respiratory Protection and Minimum Assigned Protection Factor (APF)	
		≤ 4 hours /shift	> 4 hours /shift
(iii) Handheld power saws for cutting fiber-cement board (with blade diameter of 8 inches or less)	For tasks performed outdoors only: Use saw equipped with commercially available dust collection system. Operate and maintain tool in accordance with manufacturer's instructions to minimize dust emissions. Dust collector must provide the air flow recommended by the tool manufacturer, or greater, and have a filter with 99% or greater efficiency.	None	None

34. There is no requirement to wear a respirator for this task of Table 1 under the OSHA Silica Standard.

35. Although the AL and PEL are averaged over an 8-hour day, it is highly unlikely that a worker would cut fiber cement siding products continuously for 8 hours.

36. Table 1 of the OSHA Silica Standard also provides the following exemplar engineering and work practice control methods for the use of a handheld power saw of any blade diameter:

Equipment / Task	Engineering and Work Practice Control Methods	Required Respiratory Protection and Minimum Assigned Protection Factor (APF)	
		≤ 4 hours /shift	> 4 hours /shift
(ii) Handheld power saws (any blade diameter)	<p>Use saw equipped with integrated water delivery system that continuously feeds water to the blade.</p> <p>Operate and maintain tool in accordance with manufacturer's instructions to minimize dust emissions.</p> <p>When used outdoors.</p> <p>– When used indoors or in an enclosed area.</p>	<p>None</p> <p>APF 10</p>	<p>APF 10</p> <p>APF 10</p>

37. There are OSHA-compliant and effective alternative exposure control methods for tasks involving fiber cement siding products other than those tasks and methods set forth in Table 1, including, for example, the following:

Task	Engineering and Work Practice Control	Respirator Required?
Cutting fiber cement siding or trim using a handheld circular saw with a blade <u>greater than 8 inches</u> in diameter.	<p>For tasks performed outdoors:</p> <ul style="list-style-type: none"> • Use saw equipped with commercially available dust collection system. • Operate and maintain tool in accordance with manufacturer's instructions to minimize dust emissions. • Dust collector must provide the air flow recommended by the tool manufacturer, or greater, and have a filter with 99% or greater efficiency. 	No – Not Required unless dust collection system is insufficient to maintain exposure below the OSHA Permissible Exposure Limit (PEL) of 50 micrograms of silica per cubic meter of air (50 ug/m ³) as an 8-hour TWA
Cutting fiber cement siding or trim using power saw at a fixed cutting station (e.g. table saw, panel saw or miter saw) – any blade diameter.	<p>For tasks performed outdoors:</p> <ul style="list-style-type: none"> • Use saw equipped with commercially available dust collection system. • Operate and maintain tool in accordance with manufacturer's instructions to minimize dust 	No – Not Required unless dust collection system is insufficient to maintain exposure below the PEL

	emissions. <ul style="list-style-type: none"> • Dust collector must provide the air flow recommended by the tool manufacturer, or greater, and have a filter with 99% or greater efficiency. 	
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38. These are just some examples of effective engineering and administrative controls to minimize exposure to respirable crystalline silica. NIOSH and other organizations have tested and continue to test safe, effective, and low-cost measures to reduce exposure. For example, Amerisafe has reviewed data from studies on the use of a fan while cutting fiber cement as an engineering control to reduce exposure below the PEL. The preliminary data indicates that use of this control may be effective to reduce exposure to respirable crystalline silica below the PEL.

39. In addition to exposure control methods, construction employers covered by the OSHA Silica Standard are required to:

- a) establish and implement a written Exposure Control Plan that describes: tasks that involve exposure to respirable crystalline silica; engineering controls, work practices, and respiratory protection used to limit exposure; housekeeping measures used to limit exposure; and procedures to restrict access to work areas, when necessary, to minimize the number of employees exposed to respirable crystalline silica and exposure;
- b) Designate a competent person to implement the written Exposure Control Plan; and
- c) Restrict housekeeping practices that expose workers to silica.

40. It is a falsehood to state that the OSHA Silica Standard “requires” the use of a respirator when cutting or installing fiber cement siding products.

41. The OSHA Silica Standard provides::

Engineering and work practice controls. The employer shall use engineering and work practice controls to reduce and maintain employee exposure to respirable crystalline silica to or below the PEL, unless the employer can demonstrate that such controls are not

feasible. Wherever such feasible engineering and work practice controls are not sufficient to reduce employee exposure to or below the PEL, the employer shall nonetheless use them to reduce employee exposure to the lowest feasible level and shall supplement them with the use of respiratory protection that complies with the requirements of paragraph (e) of this section.

29 CFR § 1926-1153(d)(3) (emphasis added).

42. Under the OSHA Silica Standard, employers first must utilize engineering controls (such as using water delivery systems and dust collection systems) to ensure a worker's exposure to respirable crystalline silica is below the PEL. If the engineering controls are not adequate to bring exposure levels below PEL, the employer must implement administrative controls or work practices to limit exposure to respirable crystalline silica dust. If, after exhausting both engineering controls and work practices, the employer still cannot bring exposure levels below the PEL, only then does the OSHA Silica Standard permit the use of respirators.

43. The OSHA Silica Standard provides incentives to maintain exposure levels to respirable crystalline silica below the PEL without the use of respirators. For example, the OSHA Silica Standard requires a medical surveillance program if a respirator is required 30 or more days a year to keep a worker's exposure levels below the PEL. A medical surveillance program is not required if workers' exposure is less than the PEL by using engineering controls or following Table 1 of the OSHA Silica Rule for cutting fiber cement (i.e., Task 3 of Table 1).

44. The use of a respirator under the OSHA Silica Standard is the least preferred exposure control method, not a requirement.

45. It is a falsehood to state that the OSHA Silica Standard "bans" or "requires" any specific practices or equipment in order to bring exposure levels to respirable crystalline silica below the PEL. Each contractor covered by the OSHA Silica Standard is responsible for

implementing procedures to ensure workers' exposure levels are below the PEL. OSHA does not dictate the methods implemented in doing so, but only offers guidance such as the use of wet methods and dust collection systems as engineering controls. For example, there is no requirement under the OSHA Silica Standard that fiber cement siding contractors place caution tape around a job site or "warn" neighbors that they are working with fiber cement products, though an employer may opt to include such measures as part of his or her Exposure Control Plan.

46. According to U.S. OSHA enforcement data gathered by Hilti North America, 209 citations under the OSHA Silica Standard have been issued since September 23, 2017. Of those 209 citations, only three citations were issued to Siding Contractors. A true and correct copy of a presentation provided by Hilti USA is attached hereto as **Exhibit C**.

47. Hilti's data indicates enforcement of the OSHA Silica Standard to date has primarily focused on occupations wherein workers are constantly cutting bricks, rocks, and other silica-based materials for extended periods (e.g., several hours at a time), such as masonry workers, site preparation and water/sewer line contractors. Workers cutting fiber cement siding products do not typically engage in tasks generating respirable crystalline dust (e.g., cutting) continuously over the course of several hours. Based on the reported statistics on OSHA enforcement activity to date, fiber cement siding contractors are not a priority focus for enforcement.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 10 day of July 2018.

A handwritten signature in cursive script, appearing to read "Delwyn Kubeldis".

Delwyn Kubeldis, CIH, CSP, ARM
VP-Consultation, Amerisafe Consulting and Safety
Services

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of July 2018, the foregoing was electronically filed. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by U.S. Mail, postage prepaid, and/or hand delivery. Parties may access this filing through the Court's electronic filing system.

Samuel F. Miller
Nicholas R. Valenti
Miller Legal Partners PLLC
Fifth Third Center – Suite 2000
424 Church Street
Nashville, Tennessee 37219
Email: smiller@millerlegalpartners.com
nvalenti@millerlegalpartners.com

Brian T. Boyd
William M. Leech III
Law Office of Brian T. Boyd
750 Old Hickory Boulevard
Building 2, Suite 150
Brentwood, Tennessee 37027
Email: brian@boydlegal.com
will@boydlegal.com

/s/ Maia T. Woodhouse

Maia T. Woodhouse